Supreme Court, U. S.
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80-449

IN THE

SUPREME COURT OF THE UNITED STATES

NO. _____

IN RE: WALTER STRAUS & SON, INC., PETITIONER

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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September 17, 1980

QUESTIONS PRESENTED FOR REVIEW

1. Whether a Court of Appeals has power to grant a Writ of Prohibition and/or Mandamus prohibiting a transfer of a cause under 28 U.S.C.A. 1404 after the case has already been transferred to another Circuit.

2. Whether the Court of Appeals erred in granting the Writ of Prohibition and/or Mandamus because a sufficient showing was not made by Stone to justify same.

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TO THE SUPREME COURT OF THE UNITED STATES:

OPINIONS BELOW

On July 22, 1980 the Court of Appeals for the Fifth Circuit granted an Application for Writ of Prohibition and/or Mandamus filed by Stone Commodities, Inc. to restrain a transfer under 28 U.S.C. 1404. At this time there has been no written opinion as such so there is no official report but a copy of the complete order is appended as required by Rule 23(a)(i) Supreme Court Rules. A Motion for Rehearing was denied September 11, 1980.

STATEMENT OF JURISDICTION

On July 22, 1980, the Court of Appeals for the Fifth Circuit entered the order which granted an Application for Writ of Prohibition and/or Mandamus filed by Stone Commodities, Inc. in this cause. A motion for stay of mandate was granted by the Court of Appeals for the Fifth Circuit on August 5, 1980 to allow Petitioners to file its Application for Writ of Certiorari. A motion for rehearing was filed August 4, 1980 and overruled on September 11, 1980. The jurisdiction of this Court is invoked under 28 U.S.C.A. Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether a Court of Appeals has power to grant a Writ of Prohibition and/or Mandamus prohibiting a transfer of a cause under 28 U.S.C.A. 1404 after the case has already been transferred to another Circuit.

2. Whether the Court of Appeals erred in granting the Writ of Prohibition and/or Mandamus because a sufficient showing was not made by Stone to justify same.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The following are the full texts of the applicable statutes.

28 U.S.C.A. 1404

> (a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.
>
> (b) Upon motion, consent or stipulation of all parties, any action, suit or proceeding of a civil nature or any motion or

hearing thereof, may be transferred, in the discretion of the court, from the division in which pending to any other division in the same district. Transfer of proceedings in rem brought by or on behalf of the United States may be transferred under this section without the consent of the United States where all other parties request transfer.

(c) A district court may order any civil action to be tried at any place within the division in which it is pending.

(d) As used in this section, "district court" includes the United States District Court for the District of the Canal Zone; and "district" includes the territorial jurisdiction of that court.

28 U.S.C.A. 1651

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdiction and agreeable to the usages and principles of law.

STATEMENT OF THE CASE

On June 13, 1980 the Honorable Robert Porter, U.S. District Judge for the Northern District of Texas entered his order transferring cause #CA-3-78-1017 styled Walter Straus & Son, Inc. v. Stone Commodities, Inc. to a companion case in the Eastern District of California cause #5-77-488 LKK styled Maid-Rite v. Straus. Thereafter on June 23, 1980 the U.S. Clerk in Dallas sent the original file to the Eastern District of California. On July 1, 1980 the Eastern District entered its order in respect to the case. The movant for the writ below Stone Commodities on July 7, 1980 filed its

Application for Writ with the Court of Appeals for the Fifth Circuit and on July 22, 1980 the Writ was granted. Stone never moved to stay the original transfer order, the transfer was not stayed and the District Court in California is proceeding with both cases in spite of the Writ granted by the Fifth Circuit. The following is a capsule of the background facts demonstrating how this unusual situation arose.

Maid-Rite (located in Sacramento, California) purchased some hams from Walter Straus & Son, Inc. (located in Dallas, Texas), who had in turn previously purchased the hams from Stone Commodities (located in Chicago, Illinois). These hams were ultimately declared unfit by the U.S.D.A. and destroyed. Maid-Rite filed suit in California against Straus, Stone and also Roeglein, the producer (located in San Antonio, Texas). At an early stage of the litigation Stone and Roeglein were dismissed from the litigation because Maid-Rite did not demonstrate any proof to show jurisdiction.[1] At that time Straus had no action filed against Stone or Roeglein.[2] Straus "vouched in" Stone and Roeglein, but Stone and Roeglein denied the same and refused to indemnify Straus even though from discovery it was clear Straus could not have possibly done anything to the hams because neither it nor any of its employees ever touched the hams. If anything was wrong with the hams the parties agree it was caused either by the producer, Roeglein[3] or Maid-Rite, the purchaser, who did some curing after receipt of the hams. After it became

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1 The California District Court has now changed the prior ruling by accepting jurisdiction after the transfer.

2 2.607 Uniform Commercial Code.

3 Who now has indemnified Stone, but refuses to do the same with Straus.

obvious Straus was entitled to indemnify, it filed suit in Dallas, Texas against Stone alleging indemnity and/or contribution. Stone again denied liability. Straus was then pushed in to a position of having to defend a lawsuit in California which although it might legally be liable, for which it certainly had no direct responsibility and come back to Dallas, Texas and possibly relitigate the same issues for indemnity. Most of the fact witnesses reside in either the Eastern District of California or the Southern District of Texas[4]. The District Court in Dallas sought to end this piece-mealing of litigation by granting a motion to transfer the Texas case to California. As previously stated the order was entered on June 13, 1980.

Thereafter on July 1, 1980 Stone mailed its Application for Writ of Prohibition and/or Mandamus to the Court of Appeals for the Fifth Circuit which was received on July 7, 1980.[5] No application for a stay of the transfer was ever requested or entered. The Court of Appeals thereafter entered its order complained about without a written opinion. The District Court in California has now conducted a pre-trial on both causes and takes the position that since the case has actually been transferred then the Fifth Circuit has no jurisdiction to effect a retransfer.

REASONS FOR GRANTING THE WRIT

This case has the unique fact situation of a writ of mandamus or prohibition being granted to prohibit the 1404 transfer when the Court of Appeals for the Fifth

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4 Roeglein offices are in San Antonio, Texas and outside subpoena power for the Northern District of Texas.

5 After the transfer to California was complete.

Circuit has no power over the California District Court and results in a conflict of circuits.

The ruling of the Fifth Circuit is in direct conflict with Starnes v. McGuire, 512 F.2d 918 (D.C.Cir. 1974), In re Southwestern Mobile Homes, Inc. 317 F.2d 65 (5 Cir. 1963), Drabik v. Murphy, 246 F.2 408 (2d Cir. 1957), State of Utah v. American Pipe and Const. Co., 316 F.Supp. 837 (D.C.Cal. 1970), Tharp v. Transworld Drilling Co., 367 F.Supp. 521 (D.C.Okla. 1973). Petitioner submits that this is a most important procedural question previously undecided by this Court as to (1) whether a writ of prohibition or mandamus can be granted to prohibit a 1404 transfer after transfer is complete and if so (2) what standards should be applied before granting such writ. For these and the other relevant reasons under Rule 19(b) Supreme Court Rules, Petitioner believes the Application appropriate and satisfies the necessary review criteria for certiorari.

For years it has been held that once a motion for transfer under 28 U.S.C. 1404(a) has been granted, and the papers actually transferred to the Clerk of the transferree Court, the transferor court and the Court of Appeals for the Circuit in which the transferor court is located loses jurisdiction of the case and may not proceed further with it. Starnes v. McGuire, 512 F.2d 918 (D.C.Cir. 1974). In re Southwestern Mobile Homes, Inc., 317 F.2d 65 (5 Cir. 1963), Drabik v. Murphy, 246 F.2d 408 (2 Cir. 1957), State of Utah v. American Pipe & Const. Co., 316 F.Supp. 837 (D.C.Cal. 1970), Tharp v. Transworld Drilling Co., 367 F.Supp. 521 (D.C.Okla. 1973). See also, Blakenship v. Allis-Chalmers Corp., 460 F.Supp. 37 (D.C.Miss. 1978) and Kearney & Trecker Corp. v. Cincinnati Milacron, Inc., 403 F.Supp. 1040 (D.C.Ohio 1975) aff'md 562 F.2d 365 (6 Cir. 1977). This long established rule of law has now been completely overturned by the Fifth Circuit without guidelines to work from, even if the Court was correct in granting the Writ.

Petitioner recognizes that A. C. Neilsen Co. v. Hoffman, 270 F.2d 693 (7 Cir. 1959) and Farrell v. Wyatt, 408 F.2d 662 (2 Cir. 1969) are apparent exceptions to the previously cited holdings. A. C. Neilsen Co. v. Hoffman, supra, is easily distinguished in that the transfer and the application for writ were filed the same day and there was no proof as to which came first. In our present case there is no question the application was filed after transfer was complete. Petitioner submits that Farrell v. Wyatt was simply not correctly decided. That case operated on the legal fiction that if the transferor court was not a situs where suit could have been brought that the transfer is a nullity and it can be reviewed by the circuit in which the transferor sits. Such a ruling is without specific authority and as said in Wright, Miller & Cooper Federal Practice and Procedure: Jurisdiction Sec. 3846

> "The case authority for either of these escapes is very slim, and they each create possibilities of unseemly duplication of effort, and perhaps even inter-circuit conflict, if an appeal is going forward in one circuit while the papers are lodged in a district court in another."

The rule of Farrell v. Wyatt can only lead to a situation where there is a conflict between Courts and results from the indifference of the movant for a writ in failing to ask for a stay. Indeed that is exactly what has now developed. The District Judge in California has taken the position that the Court of Appeals for the Fifth Circuit does not have any jurisdiction or power over him and has conducted a pre-trial subsequent to the grant of the writ and has indicated that he will try both cases in California regardless of the granting of the Writ by the Fifth Circuit. This procedure is not desirable or even practical and could easily be avoided by a stay of transfer having been requested and granted. Unless this Court accepts this application additional potential

chaotic situations like this can and will develop. Petitioner submits that it is poor judicial economy and that this case has the exact facts which lends it to appropriate relief.

Stone Commodities whole argument has been that because the California District Court let Stone out when orignally sued in California by Maid-Rite that this ruling automatically prohibited the Texas District Court from re-evaluating the situation and automatically voided the transfer order. Even if correct the writ should not have been granted after the transfer. Petitioner further submits Stone's rationale accepted by the Fifth Circuit was incorrect.

The prior order was not res judicata or collateral estoppel because it was not a final judgment. Remember that while Straus was an original party to the California litigation, it was not involved in the jurisdictional argument at the time it occured, only Maid-Rite was involved. Indeed the California Court had the authority and power to change the original order and especially is this true when the issue is jurisdictional. In the present case either the producer of the hams Roeglein or Maid-Rite, the Plaintiff in the California suit, caused the hams to be defective and Straus believes it can sustain in personan jurisdiction over Stone in California and that the transfer was correct. Stone has a right to challenge jurisdiction over it after the transfer and has in fact so done. Assuming the California District Court rules it has jurisdiction over Stone[6] then one is forced with opposite rulings in two circuits on the same case, all because of the writ being granted after transfer.

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6 The Court has indicated to California counsel for Straus, that it intends to maintain the combined suit in California.

Certain commentators have questioned whether there should be any interlocutory review of transfer orders under 28 U.S.C.A. 1404(a) at all. American Law Institute. Study §§ 1305(a), 1306(2), 1315(a) and 1327(a). Also Ellicott Mach Corp. v. Modern Welding Co., Inc., 502 F.2d 178 (4 Cir. 1974). On a broader spectrum the various circuits are divided on the proper test to use in a 1404 transfer.[7] An example of one test used as set out in A. Olnick & Sons v. Dempster Bros., 365 F.2d 439 (2 Cir. 1966):

> "we should make clear, in accord with these decisions of leading judges, that we will not listen to discussions whether a district judge made an error, clear-cut or otherwise, in deciding whether or not to transfer, but will entertain applications for mandamus as to transfer orders only when there is an issue of transferability or a substantial claim that the judge has refused to exercise or has usurped judicial power."

The present Straus case serves as a prime example that a writ of mandamus or prohibition is not appropriate in a 1404 transfer and only lends iself to duplicate appeals and splitting apart common lawsuits. If Straus can sustain jurisdiction in California the transfer was clearly correct, if Straus can not sustain jurisdiction in California then Stone has the appropriate remedies in California to contest the matter, but in neither situation should a writ of mandamus or prohibition be granted.

Again in our case there is no question but that the transfer was appropriate except for the jurisdictional

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7 See Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction Sec. 3855.

question. This is simply a question like any other judicial ruling - - it was right or wrong and this is not a situation in which a writ should be considered or granted. Petitioner submits that if a writ of mandamus is allowed in this case, then there is nothing more than a piecemealing of litigation which is exactly what was sought to be avoided by 1404.

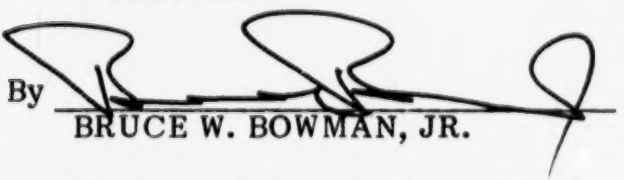
CONCLUSION

Petitioner urges this fact situation will allow the Court to specifically prohibit a writ of mandamus or prohibition from being granted after a 1404 transfer and avoid inter-circuit conflicts and also to outline the appellate tests of writ review in a 1404 transfer proceeding. In so doing the Court can also help an innocent defendant caught in a procedural quagmire.

WHEREFORE, Petitioner prays that a Writ of Certiorari be granted and that upon hearing the Writ of Prohibition and/or Mandamus be overruled and transfer allowed.

Respectfully submitted,

TURNER, RODGERS, SAILERS, JORDAN & CALLOWAY



By BRUCE W. BOWMAN, JR.

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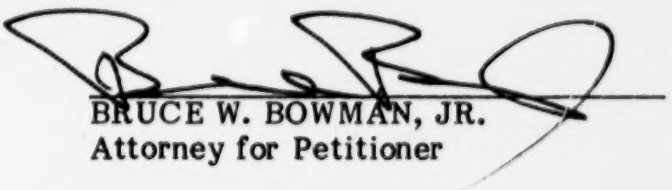
Counsel For Walter Straus & Son, Inc., Petitioner

DATED: September 17, 1980

PROOF OF SERVICE

I, BRUCE W. BOWMAN, JR., an attorney for Petitioner, Walter Straus & Son, Inc., and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 17th day of September, 1980, I served three copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit upon Henry W. Christopher, Jr., Johnson & Christopher, 210 Park North Professional Building, 4402 Vance Jackson, San Antonio, Texas 78230, and to the Honorable Robert W. Porter, U. S. District Judge, 1100 Commerce, Room 15E26, Dallas, Texas 75242, by certified mail, return receipt requested.

I further certify all parties required to be served have been served.



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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
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GILBERT F. GANUCHEAU
CLERK

UNIT A

No. 80-1693

In Re:

STONE COMMODITIES CORPORATION,

Petitioner.

- - - - -

On Petition for Writ of Mandamus and/or Prohibition
to the United States District Court for the Northern District of Texas

- - - - -

Before GEE, RUBIN and RANDALL, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the petition for writ of mandamus and/or prohibition is GRANTED.